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No._____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 198__

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THE UNIVERSITY OF TEXAS AT EL PASO,
Petitioner

V.

ELEANOR DUKE,
Respondent

* * * * * *

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

* * * * * *

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit ruling that a proper class may be certified where the class representative did not have the qualifications to hold the positions of the other class members and where the claims of harm of the putative class were many and varied is in conflict with the Court's decisions in *East Texas Motor Freight System v. Rodriquez,* 431 U.S. 395 (1977) and *General Telephone Company v. Falcon,* 457 U.S. 147 (1982).

2. Whether the Court of Appeal's holding that a finding of liability as to the class results in "a distinctly less onerous burden at the trial of an individual claim" is in conflict with the Court's decision in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

3. Whether the practice of the Court of Appeals, which permits wide-ranging class certifications in cases where the qualifications and claims of harm of the class members are diverse and varied and where damages are sought under Rule 23(b) (2), Fed.R.Civ.P. with no notice being given to the class, presents an important question of federal law which has not been settled, but should be settled by this Court.

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Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

* * * * * *

Petitioner, The University of Texas at El Paso, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 16, 1984, with rehearing being denied on June 14, 1984.

JURISDICTION

The opinion of the Court of Appeals was entered on April 16, 1984, and a timely motion for rehearing was denied on June 14, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The jurisdiction of the district court was invoked under Title VII, 42 U.S.C. §2000e, et seq., and under 42 U.S.C. §1343 with respect to the cause of action asserted under 42 U.S.C. §1983.

OPINIONS BELOW

The findings of fact and conclusions of law and the judgment

of the district court were entered on January 31, 1983. The findings and conclusions are unreported. A copy of such findings and conclusions are included in the Appendix to this Petition together with a copy of the judgment of the district court.

The opinion of the Court of Appeals for the Fifth Circuit was entered on April 16, 1984, and is reported at 729 F.2d 944. A copy of the opinion is included in the Appendix. A timely Motion for Rehearing was denied on June 14, 1984, and is set out in the Appendix, together with a copy of the judgment of the Court of Appeals.

Earlier, on September 5, 1980, district court had granted summary judgment in favor of the Defendant, The University of Texas at El Paso, based upon Plaintiff Duke's failure to follow the required administrative procedural steps as provided for by 42 U.S.C. §2000e-5(c), citing *Mohasco Corporation v. Silva*, 447 U.S. 807 (1980). The Court of Appeals for the Fifth Circuit reversed the judgment of the district court on December 9, 1981, the opinion being reported at 663 F.2d 522. Copies of the judgment of the district court and the opinion of the Court of Appeals are included in the Appendix.

STATEMENT OF THE CASE

In July of 1973, respondent Eleanor Duke filed a charge with the Equal Employment Opportunity Commission (E.E.O.C.) under the provisions of Title VII, Civil Rights Act of 1964 (42 U.S.C. §2000e, et seq.) alleging sex discriminations by The University of Texas at El Paso with respect to pay, promotion and other conditions of employment. Duke was, at that time, an associate professor in the Department of Biological Sciences in the College of Science.

Duke also complained to the United States Department of Labor of disparate treatment and that agency filed suit against the University in October of 1975 on behalf of female faculty members and employees including Duke, alleging violations of the Equal Pay Act, 42 U.S.C. §206.

During the pendency of the Equal Pay suit, the E.E.O.C. issued a right to sue letter to Duke on September 24, 1979, and Duke file suit against the University on December 20, 1979, alleging Title VII and 42 U.S.C. §1983 causes of action. The suit alleged sex discrimination in "hiring," "promotion," "compensation" and "in the condition of...employment" with respect to Duke and an asserted class of "all female faculty employees."

On September 5, 1980, the district court entered summary judgment in favor of the University with respect to the Title VII claim, grounded on Duke's failure to follow procedural steps required to confer jurisdiction on the district court, i.e. the presentment or referral of her discrimination claims to the Texas agency having the authority to grant relief. 42 U.S.C. §2000e-5(c).

The summary judgment was reversed by the United States Court of Appeals on December 9, 1981, the opinion being reported at 633 F.2d 522.

After remand, the district court initially set a trial date of March 29, 1982, a date which was extended several times.

The University moved to consolidate Duke's suit with a similar case filed by Julie Hansen, a female assistant professor in the Department of Mathematics, College of Science. The consolidation was granted on February 23, 1982.[1]

Duke then moved to consolidate her cause of action and that of Hansen with the pending Equal Pay case. Consolidation was denied by the district judge in whose court the Equal Pay case was pending.

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[1]The opinion of the Court of Appeals seems to imply that the Motion to Consolidate indicates that the University was then arguing that the question of discrimination was a common question of law and supportive of class certification. This was not the case. The Departments of Biology (Duke) and Mathematics (Hansen) were in the same college and the testimony of the several deans of the college (there were more than one during the period involved) would be common to both cases as would testimony concerning a University internal study into possible gender-related inequities. As a matter of fact, evidence was offered at the Duke trial which was considered in the Hansen case although the Hansen cause had been severed, because of Hansen's ill health, when Duke went to trial.

Duke also moved to continue the trial setting, filed her first request for recovery on April 2, 1982, and her motion for class certifiction on May 13, 1982.

The discovery sought by Duke included employment information with respect to fourteen University departments and was opposed by the University for the reason the employment decisions were made within the various departments and not at a centralized, University level. Complete employment data was offered and made available with respect to the Departments of Biological Sciences and Mathematics.

The class certification hearing held on May 19, 1982 confirmed the fact that decisions with respect to pay, promotion, tenure and other conditions of employment were indeed made within the various departments, and the district court denied class certification and Duke's University-wide discovery request on this ground.

The Duke trial commenced on October 19, 1982. The Hansen case was severed because Hansen was ill at the time, although, as noted earlier, some evidence was offered consideration in both the Duke and Hansen cases. Following the conclusion of the Duke trial, the district court entered judgment for the University and findings of fact and conclusions of law. With respect to the Title VII cause of action, the court found that Duke's lack of publications, not her sex, explained the employment practices she complained of and found that a male professor with the same publications problem was treated similarly. The §1983 cause of action was found to be barred by the Eleventh Amendment to the United States Constitution.

The decision of the district court was reversed by the Court of Appeals, rehearing was denied and the University now seeks a writ of certiorari from this Court.

REASONS FOR GRANTING THE WRIT

1.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN THIS CASE CONFLICTS WITH THIS COURT'S DECISIONS IN

EAST TEXAS MOTOR FREIGHT SYSTEM V. RODRIGUEZ, 431 U.S. 395 (1977), AND _GENERAL TELEPHONE COMPANY V. FALCON_, 457 U.S. 147, (1982) AND DEMONSTRATES THAT THE BROAD ACROSS-THE-BOARD CLASS ACTION RULE OF THE FIFTH CIRCUIT IS NOT DEAD DESPITE THE RULINGS IN THE ABOVE CITED DECISIONS.

The Court of Appeals decision, for which review is sought, stated:

> We reverse and remand...for a new hearing on requested class certification, for a trial on the claims of any certified class...

This determination, in the context of the case, is incorrect and violates the rulings of this Court.

Duke was a professor of biology at the University and does not have the requisite qualifications to hold the positions occupied by females in other university departments. As this Court observed in *East Texas Motor Freight System v. Rodriguez*, 431 U.S. 395 (1977), the named plaintiffs (city drivers):

> ...*lacked the qualifications* to be hired as line drivers. Thus, they could have suffered no injury as a result of the alleged discriminatory practices, and they were simply not eligible to represent a class of persons who did allegedly suffer injury.
>
> (Emphasis Supplied)

Equate city drivers, as opposed to line drivers, with a biology professor (Duke), as opposed to a professor in business administration, psychology, or physics, and it is apparent that Duke could not represent females in other departments of The University of Texas at El Paso–she lacked the requisite qualifications. The same holding was reiterated in *General Telephone Company v. Falcon*, 457 U.S. 147 (1982); and by inference in *University of Houston v. Wilkins*, ____U.S.____, 103 S.Ct. 34 (1982), on remand, 695 F.2d 134 (5th Cir. 1983).

Furthermore, Duke's varied claims of harm or injury make the present case inappropriate for class action certification. Duke's Complaint in this case alleged that she was discriminated against because of her sex in that she was:

1. Not promoted to full professor upon the receipt of her Ph.D.; and

2. Denied summer school teaching employment.

Duke further asserted that she and other female employees were discriminated against in:

3. Promotions;

4. Salary, compensations and other benefits; and

5. The terms and conditions of employment.

In Duke's Motion for Class Certification and Brief in Support Thereof, filed with the district court, she added discrimination with respect to:

6. Job assignments (receipt of "unattractive work assignments").

These wide-ranging claims of injury, which some class members may have and others may not, destroy the commonality and typicality requirements of a proper class action. *General Telephone Company v. Falcon,* supra; *University of Houston v. Wilkins,* supra.

Still another reason, foreclosing any possibility that a class action is appropriate, arises from the finding, apparently not disturbed by the Court of Appeals, by the district court that pay and promotion decisions were made on an individual, departmental basis by departmental chairman and departmental committees with little direction from deans and almost no direction from the University president and the vice-president for academic affairs. The total lack of a centralized decision-making process for employment matters erases any possibility of there being a viable University-wide class. The claims of

harm of one departmental member cannot be the same as those of members in other departments.

A final reason, which forcibly demolishes any possibility that there can be a class of University female faculty members who are victims of discrimination, is found in the Record on Appeal. That Record clearly demonstrates that there can be no widespread sex discrimination at The University of Texas at El Paso.

The Court of Appeals opinion refers to, and relies strongly upon, "a UTEP report" of a study made in 1973 which "found that eleven of then 69 female faculty members were paid less than their male counterparts because they were women." However, an analysis of the report shows that it does not support the conclusion reached by the Court that sex discrimination is shown.

First, taking the statement of the panel at face value, 11 out of 69 women does not constitute a far-reaching policy of discrimination.

Second, the report completed by the ad hoc committee, which studied "gender related salary inequities," specifically found no gender related inequity in the case of Eleanor Duke.

Third, the committee was composed of two men and five women, the women being Jamie Bowen (Director of Office of Institutional Studies), Lola Dawkins (Professor of Business), Frances Hernandez (Associate Professor of English), Judith Goggin (Associate Professor and Chairman of Psychology), and Lou Burmeister (Professor of Curriculum and Instruction). The very composition of the committee demonstrates that women could become full professors, department chairmen, and occupy the positions in the administration of the University (and the year was 1973, the same year that Duke filed here charge of discrimination with the EEOC.)

Fourth, the panel ignored the committee's finding that:

> Overt, intentional discrimination against faculty at U.T. El Paso on the basis of sex does not exist. Several

> inequities in salaries are evident. A larger fraction of women than men are the subjects of these salary inequities.

The panel further ignored the following explanation of the committee regarding the inequities that it did find:

> There is a history of hiring under-qualified faculty members at U.T. El Paso to teach in lower division courses. Both men and women are in this category, but generally one finds more women than men at U.T. El Paso that do not fit into the common image of a productive, scholarly university professor. Some departments, particularly English and Curriculum & Instruction, continue to hire under-qualified faculty members, usually women, at relatively low salaries. The pattern that prevails in some departments is a faculty of doctorate-level men and women at higher ranks with compensation based on definable merit, and a junior faculty of men and women with lower salaries for the women based on less justifiable criteria. In many cases, the contributions of the lower-level men and women are comparable, but salaries are higher for the men (average = $500.00). The men are often younger with substantial and continuing progress toward a Ph.D degree. The women are often older and have terminated their education at the M.A. degree level. Salary is then partly based on future expectations and also, of course, on economic factors present in the job market.

This explanation refutes any deliberate, intentional University-wide policy of discrimination against women as discrimination is defined by Title VII. And, surely, the female majority on the committee would be fair to the members of their own sex.

Other evidence of non-discrimination against women by the University is found in the record of the Class Action Certification where a stipulation as to the testimony of several witnesses was made. The report referred to above sets out the colleges

incorporated within UTEP, such colleges being those of Business Administration, Education, Liberal Arts, and Science. (There are also the Colleges of Engineering and Nursing which were not studied by the committee, the faculty of one being all male and the faculty of the other being all female, with two exceptions.) It is significant to note that, at the time of the class action hearing in this cause, the deans of the College of Liberal Arts and the College of Education were women, and the acting dean of the College of Business Administration was a woman (three female deans out of four) hardly a situation supporting an inference of University-wide discrimination against women. Furthermore, it was stipulated that these deans would have testified that sex never was a factor in any decision that they made concerning pay and promotion.

What the University is urging, in addition to the impropriety of a class action as a matter of law, is that the evidence at the trial and the class certification hearing clearly shows that there was no University-wide discrimination and that there can never be a class of female faculty members who suffer from sex discrimination as a matter of fact.

The Record could not more clearly demonstrate the patent absurdity of remanding this case for a new class certification hearing or that the Court of Appeals ignored this Court's rulings in *Falcon* and *Rodriguez.*

The law regarding class action cases has been in disarray in the Fifth Circuit for years with disastrous consequences to the district courts of the Circuit and to defendants in civil rights cases.

It should be remembered that both *Falcon* and *Rodriquez* were cases from the Fifth Circuit. And *General Telephone* had to be twice decided by this Court to remedy the Fifth Circuit's erroneous concept of the efficacy of across-the-board class certifications. See the first *General Telephone* case, 450 U.S. 1036 and the Court of Appeals reaction thereto at 647 F.2d 633.

The decision of the Court of Appeals in the subject case--that the cause be remanded for a new class action hearing--is clearly erroneous. There can be no class in *Duke* because:

1. Duke does not have the qualifications to hold any faculty position but her own and so is not a member of a class of faculty females;

2. Duke's varied claims of harm cannot uniformly mirror the claims of harm of the class thus eliminating the requisite commonality and typicality;

3. The employment decisions of the University are not centrally made, again destroying commonality and typicality; and

4. The entire trial record shows no University-wide discrimination and demonstrates that a number of faculty women did rise successfully in the University and so cannot have the common or typical problems and harm claimed by Duke.

The Petition for Writ of Certiorari should be granted to correct, at the very least, the erroneous concept of class actions embraced by the Court of Appeals in this case.

2.

THE COURT OF APPEALS DECISION CONFLICTS WITH THE DECISION OF THIS COURT IN *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE*, 450 U.S. 248 (1981).

The decision of the Court of Appeals observed and held, in part:

> Had Duke's class claims prevailed, she would have faced a distinctly less onerous burden at the trial of her individual case.

The Court of Appeals' reliance upon the Court's decision in *Teamsters v. United States*, 431 U.S. 324 (1977), to alter the burden of proof when considering individual claims is misplaced.

The holding in *Teamsters* can apply only to a pattern or practice case where disparate treatment as to one employment practice can be shown to apply uniformly to a certain class of persons. In *Teamsters*, the practice or policy was the non-hiring of Negroes to be line drivers and it applied uniformly to this class. The evidence showed that in Atlanta the company had 57 line drivers and in Los Angeles had 374 such drivers. Of these drivers, none was a Negro. Similar disparities existed in San Francisco, Denver, Nashville, Chicago, Dallas and several other terminal locations. The company and the union had a policy of never (or almost never) hiring Negroes as line drivers. (Spanish surnamed persons were also extremely rare in line driver positions.) When this policy was proved at the liability phase, this established pattern and practice carried over to the individual cases at the remedial stage. This Court held,

> ...as is typical of Title VII *pattern-or-practice suits*, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of discrimination. The force of proof does not dissipate at the remedial stage of the trial. The employer cannot claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discrimination...
>
> The proof of the...practice supports an inference that any particular employment decision...was in pursuit of that policy...
>
> ...(it need only be shown) that an alleged individual discriminatee unsuccessfully applied for a job and was therefore a potential victim of proved discrimination.
>
> ...the burden then rests on an employer to demonstrate that the individual applicant was denied employment for lawful reasons.
>
> 431 U.S. 361, 362

Teamsters is applicable only to a pattern or practice suit involving disparate treatment where proof of class membership is presumably sufficient to create the presumption of

discrimination. Here we deal with individualized departmental decisions and no such presumption is justified.[2]

The *Teamsters* procedural and evidential rule presumably applies to disparate impact cases, such cases as the use of aptitude and intelligence tests or educational requirements which are not job related and which impact a particular minority, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and the use of height and weight requirements, *Dollard v. Rawlinson*, 433 U.S. 321 (1977). In both cases a facially neutral requirement impacted upon a particular group.

Teamsters would apply to the present case only if the University had some policy that applied to all women equally, i.e., the consistent policy of hiring only male professors or a uniform policy of never promoting women to the associate or full professor.

However, the holding in *Teamsters* should not apply to a disparate treatment case where intent to discriminate cannot be inferred because there is no uniform employment policy. *Duke* is such a case and the rule as to the burden of proof in *Teamsters* is inapplicable. Here, the record indicates no consistent practice which applies to women in one area of employment. Rather, the Record demonstrates that women have actually achieved the benefits which Duke claims were denied her because of sex discrimination, i.e. promotion to full professorships and high, administrative posts with the attendant pay advantages. Indeed those decisions are made on a departmental basis.

In this case, even if it is assumed for sake of argument that class discrimination can be shown, each separate employment decision affecting each individual class member must be examined individually and intent to discriminate must be shown as to each decision. As the court held in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981):

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[2]It can be argued that *Teamsters* merely states the *Burdine* Rule, and that after the employer "demonstrate(s)" "lawful reasons" for denying employment (equate with *Burdine's* "introduction of...evidence," to demonstrate "the reasons for the plaintiff's rejection"), the burden of persuasion remains with the plaintiff to show discrimination.

> The ultimate burden of persuading the trier of fact that the defendant *intentionally* discriminated against the plaintiff remains at all times with the plaintiff.
>
> (Emphasis supplied)

The evidentiary statement of the Court of Appeals points out the vice of an across-the-board class certification where many claims of harm are made and the class varies widely in qualifications and skills. In such a certification, the bifurcated, two phase or two stage hearing is needlessly cumbersome.

First, the trial court has a hearing as to class discrimination and statistically significant discrepancies in the pay of female employees as opposed to male employees. In such an eventuality, the court might then infer discrimination as to the class. But this would not be correct because the statistics are significant *only* if the differences cannot be explained by some legitimate, non-discriminatory reason or reasons which account for the difference in pay. And, in theory, a defendant should have the opportunity at the first phase or stage to show that these are legitimate reasons for pay differentials. If defendant can do so only for the class representative, the representative cannot then represent the class since he/she had not suffered the same injury as the class. The case is over for the individual plaintiff and for the class. Evidence that other absent class members were not discriminated against would also be relevant to show a lack of class-wide discrimination and that the requisite numerousity is lacking.

Second, any finding of class discrimination is of little value in a case where the labor force is composed of persons with widely diverse qualifications and/or where a number of different employment practices are complained of that are not common to all of the asserted class members. The individual cases of each woman employee in a sex discrimination case will have to be inquired into to see if she had the qualifications for pay raises or for promotion and to determine if some reason other than sex was responsible for the employment decision. One hundred class members--one hundred separate trials. Thus, the first phase of the class action hearing has accomplished nothing even if a finding of class-wide discrimination has been made, and the

class device has not accomplished its purpose--the saving of judicial and litigant resources.

The Court of Appeals' announcement that Duke would have a " distinctly less onerous" burden of proof if the class claims prevailed is mischief making. At most such a finding should only shift to defendant the burden of going forward with evidence by way of explanation for its actions. For under *Burdine* the burden remains upon the plaintiff to persuade the trier of fact of the existence of intentional discrimination.

3.

THE PRACTICE OF THE COURT OF APPEALS WHICH PERMITS WIDE-RANGING CLASS CERTIFICATIONS, IN CASES WHERE THE QUALIFICATIONS AND CLAIMS OF HARM OF THE CLASS MEMBERS ARE DIVERSE AND VARIED AND WHERE DAMAGES ARE SOUGHT, UNDER RULE 23(b)(2), FED.R.CIV.P., WITH NO NOTICE BEING GIVEN TO THE CLASS, PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED, BUT SHOULD BE SETTLED BY THIS COURT.

The opinion of the Court of Appeals in Footnote 1 states:

> We note that in his order on class certification the district judge found that any common questions of law did not predominate over questions affecting individual matters. We do not find this Rule 23(b)(3) inquiry helpful in a class certification motion under Fed.R.Civ.P. 23(b)(2).

The Statement is Legally Erroneous

First, Rule 23(b)(2) was added by the 1966 Amendments to the Federal Rules of Civil Procedure where injunctive or declaratory relief is sought. Notes of Advisory Committee on Rules, 1966 Amendment, Note to Subdivision (b)(2). As the Notes explain:

> The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to damages.

In this case, the Record indicates that damages are the touchstone of Duke's suit with injunctive relief being an incidental facet of the suit.

Second, theoretically, a class certifiable under Rule 23(b)(2) should be more homogenous than under Rule 23(b)(3)– "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief..." Accordingly, an "inquiry" as to whether "individual matters" predominate over "common questions" would demonstrate that the purported class is not homogenous or cohesive since the defendant has not acted "on grounds generally applicable to the class." Indeed, with respect to the permissive notice provisions of Rule 23(d)(2), the Notes of the Advisory Committee point out that:

> In the degree that there is cohesiveness or unity in the class...the need for notice to the class will tend toward a minimum.

Rule 23(b)(2) is not even mentioned, indicating that the Committee assumed such class has the greatest "homogenousness and unity" of all the class actions. Therefore, any inquiry into the diversity of the class claims as made by the district court is both permissible and desirable in deciding whether a Rule 23(b)(2) certification should be ordered with the Rule's lack of notice requirement.

BUT MORE IMPORTANT

Certification Under Rule 23(b)(2) With No Notice Exposes Class Action Defendants to Unintended, But Dire Consequences

The law of the Fifth Circuit is that an across-the-board certification can be made under Rule 23(b)(2) where damages are sought and with no requirement that notice be given to the class. *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *Person v. Terminal Transport Co.*, 634 F.2d 989

(5th Cir. 1981). This state of the law has posed many problems to the district courts and litigants and has resulted in basic unfairness to class action defendants.[3]

As suggested above, Rule 23(b)(2) was designed to provide class action treatment in a civil rights case where injunctive or mandatory relief is sought. It was intended to cover situations such as:

1. A municipal ordinance prohibiting all blacks from using city swimming pools;

2. A state statute forbidding all Mexican-Americans from voting in statewide elections; or

3. A board or regents rule prohibiting a university from hiring any women faculty members.

Relief for the class representative in any of the above classes, by way of an injunction against the ordinance, statute, or rule, is relief for all of the particular class. No separate trials need be held with respect to the individual class members--their claims of harm are the same.

The situation is far different where members of the alleged class are seeking back pay or damages and have varied claims of harm and diverse employment qualifications.

Combine the across-the-board certification with no notice being given to the class upon certification and the following consequences ensue:

(1) A breakdown of the class action as a judicial time-saving device;

(2) An abolition of the protections of res judicata and the statute of limitations; and

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[3]Other jurisdictions have permitted the award of damages in Rule 23(b)(2) cases where damages are said to be incidental to the granting of an injunction. Usually, however, notice is given to the class.

(3) As an end result, a basic unfairness to class action defendants.

The class action principle was designed to conserve judicial time and the time of the parties involved. Where a class contains members with different positions and who have varied claims of harm, a large number of individual cases and claims must be tried separately. Judicial efficiency is in no way served, and there is no avoidance of multiple litigation.

Because of the "no notice" requirement in an across-the-board certification, the defenses of res judicata and limitations are denied to a class action defendant sued within the Fifth Circuit. A class is certified which stops the running of limitations for all members. *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974). No notification to the class is given, thus foreclosing an opportunity of members to opt out of the class and bring individual cases or be faced with running of limitations or, to stay in the lawsuit and be bound by an adverse decision. The case is tried. Named plaintiffs lose their individual cases and no discrimination is found as to the class and the judgment is upheld on appeal. But because of the unhappy consequences to absent class members, the Fifth Circuit has determined that the class action is not res judicata to such absent class members where no notice is given under a 23(b)(2) class certification. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 845 (5th Cir. 1975); *Johnson v. General Motors Corp.*, 598 F.2d 432 (5th Cir. 1979). See also, *Wheeler v. City of Columbus*, 703 F.2d 854, 855 (5th Cir. 1983).[4] Accordingly, one of the great advantages of the class action case--its res judicata effect--has disappeared.

Likewise, as indicated, the defense of limitations is erased. The pendency of the across-the-board class case has tolled the running of limitations. *American Pipe and Construction Co. v. Utah*, supra.

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[4]In this Court's decision in *Cooper v. Federal Reserve Bank of Richmond*, ___U.S.___, 52 L.W. 4853 (1984), the class was certified under both Rules 23(b)(2) and 23(b)(3) and notice was given to the class.

Since limitations do not run as to absent class members, these absentees, where no notice is given, can wait to learn of the outcome of a case. If unfavorable, they can file their own cases. Or, if favorable, they move in to take advantage of a decision probably long after the case was filed. Thus, jurisdiction is created for the absent members in a Title VII case or in other civil rights cases many years after a possible violation occurs and at a time when a defendant may have lost his supervisory employees who might be in a position of showing legitimate, non-discriminatory reasons for the employment decision complained of. See *Robinson v. Union Carbide Corp.*, 544 F.2d 1258 (5th Cir. 1977), where the problem of "sideline sitters" was recognized, but the remedy for this situation was not.

The across-the-board class concept, coupled with the use of Rule 23(2)(b) and its no notice requirement in a case where damages are sought, also creates severe manageability problems for a district court. The Fifth Circuit case of *Pettway v. American Cast Iron Pipe Company* graphically illustrates these difficulties, including the problem of not inquiring into the possible defenses which the Court of Appeals decision suggests is not germane in a class action certification hearing.[5] *Pettway* began in 1967. The latest written opinion of the Court of Appeals in that case was in 1982, and it is reported at 681 F.2d 1259. The latter opinion is the fifth of a series of appellate reviews by the Court of Appeals with the latest appellate opinion focusing on how relief can be fashioned for an amorphous class where the claims of harm differ and where qualifications are in issue. A Petition for Writ of Certiorari was filed in this Court by American Cast Iron Pipe Company, a motion to defer consideration of the petition was granted on October 3, 1983, ____U.S.____, 104 S.Ct. 59, and finally on June 13, 1984, the petition was dismissed pursuant to Rule 53, Supreme Court Rules. Perhaps *Pettway* has finally been laid to rest. *Pettway* illustrates graphically the management problems of Fifth Circuit class actions and brings to mind the concurring and dissenting opinion of Chief Justice Burger in *General Telephone Co. v. Falcon* in which he stated:

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[5]The University would argue that, if the defenses are varied, the cases should not be certified as a class action, in any event, since commonality and typicality are lacking.

> Like so many Title VII cases, this case has already gone for years, draining judicial resources as well as the resources of the litigants. Rather than promoting judicial economy, the across-the-board class action has promoted multiplication of claims and endless litigation.

Join the across-the-board class certification and the no-notice doctrine of the Fifth Circuit with its attendant destruction of the defenses of res judicata and limitations and the straits of a Fifth Circuit defendant are dire indeed.

However, even if the across-the-board certifications are finally disposed of and extinguished, the no-notice problem will remain if not dealt with by this Court. Even with a homogenous class with the same claims of harm, a defendant is entitled to notice to the class to insure the availability of the defenses of limitations and res judicata at some stage of the judicial proceedings in a case where damages are sought.

The use of Rule 23(b)(2) as a class action certification device with its no notice requirement presents an important question of federal law which should be settled by this Court.

Certiorari should be granted to resolve the problem.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By affixing his signature to the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, David R. Richards hereby certified that three true and correct copies of same have been served on this the _____ day of September, 1984 by United States Mail, postage prepaid upon:

Mr. Thomas A. Spieczny
4171 N. Mesa Street
Suite C-206
El Paso, Texas 79902

Mr. Antonio Crotez
747 San Antonio Street
Suite 100
El Paso, Texas 79901

APPENDIX

A. Opinion of the Court of Appeals for the Fifth Circuit of Which Review is Sought

B. Judgment of the Court of Appeals

C. Denial by the Court of Appeals of Petition for Rehearing

D. Findings of Facts and Conclusions of Law of the District Court

E. Judgment of the District Court

F. Prior Order of the District Court Granting Summary Judgment

G. Prior Opinion of the Court of Appeals Relative to Order Granting Summary Judgment

APPENDIX A

Eleanor DUKE, Plaintiff-Appellant,

v.

The UNIVERSITY OF TEXAS AT EL PASO,
Defendant-Appellee.

No. 83-1123.

United States Court of Appeals,
Fifth Circuit.

April 16, 984.

Professor brought action against university alleging that university discriminated against her in promotion, compensation and assignment because of sex. Following remand, 663 F.2d 522, and denial of rehearing, 669 F.2d 733, the United States District Court for the Western District of Texas, Lucius Desha Bunton, III, J., denied motion for class certification and sustained university's effort to confine discovery, and professor appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that trial judge's failure to allow discovery of promotion and pay records of other departments of university was abuse of discretion.

Reversed and remanded.

Federal Civil Procedure —1591

Trial judge in employment sex discrimination action against university abused his discretion in failing to allow plaintiff's requested discovery of promotion and pay records of other departments of university where her effort to show that university's explanations were pretextual was prejudiced by cropping of opportunity to discovery practices of other departments.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Eleanor Duke appeals from a judgment in a bench trial in favor of her employer, The University of Texas at El Paso. Duke, a biology professor at UTEP, brought suit under Title VII, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1983, alleging sex discrimination in pay, promotion, and teaching opportunities. On appeal, she argues that the district court prejudiced her effort to obtain class certification and to prove discrimination in her individual suit by unduly restricting discovery. We review the discovery rulings by an abuse of discretion standard and reverse.

I

In July 1973, Duke filed a charge with the Equal Employment Opportunity Commission, alleging that UTEP was guilty of university-wide discrimination against female faculty members in pay, promotion and work assignments. An EEOC investigation found reasonable cause to believe that UTEP discriminated on a university wide basis in pay and promotion procedures. The EEOC then sued UTEP, alleging violations of the Equal Pay Act. 29 U.S.C. § 206(d). On September 24, 1979, the EEOC notified Duke of her right to sue under Title VII.

On December 20, 1979, Duke sued UTEP, individually and as class representative of all female faculty members, alleging that UTEP, contrary to the constitution and Title VII, discriminated against her and other female faculty members in pay, promotion and teaching opportunities. On January 39, 1980, the district court issued its standard order that discovery be completed by all parties within four months, but within thirty-five days granted UTEP's motion to dismiss Duke's complaint for failure to exhaust her administrative remedies. Upon Duke's motion to reconsider, the district court held a hearing on March 27, 1980 and withdrew its order dismissing the complaint. It then held a second hearing on the motion to dismiss on August 11, 1980, at which it took evidence. On September 8, 1980, the district court granted summary judgment to UTEP, finding that Duke had failed to exhaust her administrative remedies. We reversed that judgment, 663 F.2d 522, and the mandate was filed with the District Court on February 9, 1982.

Seven days after remand, UTEP moved to consolidate Duke's case with a similar suit filed by Julie Hansen, a math professor at UTEP, arguing that the suits charging sex discrimination in the two departments presented common questions of law and fact. They were consolidated on February 22, 1982. On March 5, 1982, Duke sought further consolidation with the still-pending EEOC case. UTEP opposed this consolidation and Duke's motion was never ruled on, although the district judge presiding over the EEOC case denied a similar motion.

On February 23rd, approximately two weeks after this court's remand, the district judge set the case for trial on March 29, 1982. Duke moved to delay trial until she had a reasonable time to complete discovery, pointing out that, among other difficulties, no hearing on her requested class certification had been held. The district court removed the case from the trial setting.

With the case removed from the trial setting, discovery started. In response to Duke's April 1982 interrogatories inquiring about all departments that contained male and female faculty members, UTEP provided information concerning salary promotion and work opportunities for the biology and math departments but, on April 26, 1982, moved for a protective order confining discovery to those two departments. In seeking to confine the discovery UTEP argued that, because relevant personnel decisions were made at the department level, data about other departments would not lead to admissible evidence.

Four days later, on April 30, 1982, the district court *sua sponte* scheduled a class certification hearing for May 19, 1982. On May 13, 1982, Duke formally moved for class certification and undertook to brief the merits of UTEP's motion for protective order and prepare for the certification hearing without the requested discovery. At the May 19th hearing, the district judge refused to decide the questions concerning the scope of discovery but indicated that he would later decide those questions on the submitted briefs.

On June 14, 1982, the district court denyed Duke's motion for class certification. He didn't resolve the discovery dispute until October 18, 1982, the day before trial on Duke's individual claim, when he sustained UTEP's effort to confine discovery.

II.

It is apparent that Duke was not given an adequate opportunity to conduct meaningful discovery before the class certification hearing. Despite UTEP's successful claim that common questions of law and fact existed between Duke, the biology professor, and Hansen, the math professor, the trial court refused to grant Duke access to promotion and pay records of other departments of the University and then refused to certify any class of female professors, finding insufficient common questions of law and fact.[1] Similarly, in Duke's individual trial the court found that Duke failed to show that the reasons given for her disparate treatment were pretextual, *see Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973). Indisputably, Duke's ability to show that UTEP's explanations were pretextual was central to her discrimination claim. That effort was prejudiced by the cropping of her opportunity to discover the practices of the other university departments.

It is significant that the record reflects that the discovery request was based on more than a fanciful hope of counsel. A UTEP report had found in an internal study that eleven of the then 69 female faculty members were paid less than their male counterparts because they were women; that self-study was not confined to the math and biolody departments. While UTEP successfully argued to the district court that relevant decisions were made at a departmental level, Duke was not allowed the opportunity to place that asserted "fact" in context. We cannot say that this effort was here so improbable of success that all discovery from other than the biology and math departments ought to have been denied. The EEOC found, for example, that

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[1] We note that in his order on class certification the district judge found that any common questions that existed did not predominate over questions affecting individual matters. We do not find this Rule 23(b)(3) inquiry helpful in a class certification motion under Fed.R.Civ.P. 23(b)(2). Nor do we read *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030 (5th Cir.1981), to sustain the proposition that a putative class of 125 members necessarily lack numerosity.

> Each department evaluates its own faculty and is free to develop its own methods and procedures for evaluation for tenure, promotion and salary increases. However, we found, from the record, that the method used in the Biological Science Department is fairly representative of the method used in Respondent University as a whole.

UTEP now urges that Duke's counsel ought to have capitalized on the discovery conducted in the EEOC suit. Counsel for Duke did attempt to participate informally in the discovery occurring in the EEOC case, but UTEP refused. Then at the October 18th hearing, when the motion for protective order was being decided, UTEP's counsel argued that any disadvantage incurred by Duke by not confining discovery to the math and biology departments was minimized by her ability to use the EEOC's "expert" who has attempted several regressions of data obtained in the EEOC case. Yet, at this same hearing UTEP's attorney also urged that the expert's testimony not be admitted because the data based on which he relied was hopelessly flawed. At trial UTEP pointed out that the expert's analysis contained 463 errors.

In sum, there is no question but that Duke's April 1982 discovery requests, which were pending before the district court in May 1982, were relevant to both the class action certification and Duke's individual claim. Under the circumstances, failure to allow the requested discovery was an abuse of discretion. Though we are reluctant to find abuse when the trial court's discretion is as wide as it is in the superintendence of discovery, we have done so where the facts mandated such a finding.

In *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir.1973), we reversed a judgment in which Burns was found not to have been the victim of racial discrimination and remanded for a new trial because Burns has been denied discovery of data of employment practices throughout the plant at which he worked. We stated:

> Because discovery matters are committed almost exclusively to the sound discretion of the trial Judge,

> appellate rulings delineating the bounds of discovery under the Rules are rare. But the Judge's discovery rulings, like his other procedural determinations, are not entirely sacrosanct. If he fails to adhere to the liberal spirit of the Rules, we must reverse. *See Wallin v. Fuller and Nationwide Mutual Insurance Co.*, 5 Cir. 1973, 476 F.2d 1204 [1973]. And this is especially true in Title VII cases where courts have refused to allow procedural technicalities to impede the full vindication of guaranteed rights. *Sanchez v. Standard Brands, Inc.*, 5 Cir. 1970, 431 F.2d 455, 461.

Burns v. Thiokol Chemical Corp., 483 F.2d at 304-05. *See also Trevino v. Celanese Corp.*, 701 F.2d 397, 406 (5th Cir. 1983).

Finally, UTEP misses the mark in suggesting that any prejudice to Duke was harmless because Duke later lost on trial of her individual claims and cannot complain on behalf of a class of which she was not a member. Had Duke's class claims prevailed, she would have faced a distinctively less onerous burden at the trial of her individual claim.

We are sympathetic with the trial court's efforts to contain discovery and manage a heavy docket. A trial judge must be able to direct discovery and act promptly to prevent abuse without being second-guessed by appellate judges remote from the scene. Here, however, we are persuaded that the curbs on discovery were not sufficiently tailored to the case and undue prejudice resulted. We reverse and remand to allow the parties to complete discovery, for a new hearing on requested class certification, for a trial of the claims of any certified class and for a new trial of Duke's individual claim.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 83-1123

D.C. Docket No. EP-79-CA-246

ELEANOR DUKE,
Plaintiff-Appellant,

versus

UNIVERSITY OF TEXAS AT EL PASO,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

Before WISDOM, REAVLEY and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby remanded with instructions to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

APRIL 16, 1984

ISSUED AS MANDATE:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83-1123

ELEANOR DUKE,

Plaintiff-Appellant,

versus

UNIVERSITY OF TEXAS AT EL PASO,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(June 14, 1984)

Before WISDOM, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS EL PASO DIVISION

ELENOR DUKE	§	
	§	
V.	§	NO. EP-79-CA-246
	§	
THE UNIVERSITY OF TEXAS AT EL PASO	§	
	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On October 19, 1982, trial in the above-captioned case was had before the Court. After reviewing all the testimony and exhibits introduced at trial, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff ELEANOR DUKE is a Full Professor at the Defendant UNIVERSITY OF TEXAS AT EL PASO ("UTEP"), in the field of biology.

2. The Defendant is an institution of higher education with its campus located in El Paso County, Texas, and is an "employer" within the meaning of 42 U.S.C. §2000e, *et seq.*, and is a subdivision of the State of Texas.

3. Plaintiff Duke has brought suit against Defendant UTEP under 42 U.S.C. §2000e, *et seq.* ("Title VII"), and under 42 U.S.C. §1983. The gravamen of Plaintiff's complaint is that she was discriminated against on the basis of sex in matters of promotion, pay, and summer school teaching opportunities. By way of defense UTEP asserts that all actions affecting Plaintiff's employment were made without regard to Plaintiff's sex, and for reasons other than sex.

4. Plaintiff has complied with all administrative prerequisites under 42 U.S.C. §2000e, *et seq.*

5. DUKE received a Bachelor of Arts in Biology and Mathematics from the Texas College of Mines and Metallurgy in 1939. This institution later became known as Texas Western College, and then by its present name, THE UNIVERSITY OF TEXAS AT EL PASO. In 1945, DR. DUKE received a Master of Arts in Microbiology from the University of Texas at Austin. In 1967, DR. DUKE received her terminal degree, a Ph.D., in Ecology-Microbiology from the University of Texas at Austin.

6. Plaintiff began employment with Defendnat UTEP in 1937, as a lab assistant, becoming an instructor in the biology department in 1940. She became an assistant professor in the department of biology in 1953, and an associate professor in 1960. DR. DUKE was promoted to full professor in the department of biology on March 1, 1976.

7. During the early 1960's, UTEP, then Texas Western College, began a transition from college to university status which included improving the institution's academic standing, in part by upgrading the faculty by normally requiring the Ph.D. degree and emphasizing research and publication by the faculty. This transition and upgrading is described in a 1963 publication by the institution entitled "Mission '73."

8. In the fall of 1964 and the spring of 1965, and again in the spring of 1967, Plaintiff took leaves of absence in order to obtain a Ph.D. degree in biology from the University of Texas at Austin, apparently in response to the planned and on-going upgrading of the institution.

A. Promotion

9. Plaintiff claims that she should have been promoted to the rank of full professor upon receipt of her Ph.D. degree. Plaintiff asserts that she was promised such a promotion by Dr. Anton Berkman, now deceased, former chairman of the Department of Biological Sciences. She further alleges that men routinely received such promotions upon receipt of their Ph.D.'s

10. Apparently Texas Western College did have a generalized practice of promoting faculty members who obtained Ph.D. degrees. This was not automatic, however, and in the

Department of Biological Sciences, only one male, Dr. James Reeves, was promoted on that basis. At the time of his promotion, he was department chairman. Four other faculty members in the biology department were hired before 1963 and either had or subsequently obtained the Ph.D degree. Two faculty members, Webb and Metcalf, were promoted to full professors six years after receipt of their Ph.D. degrees. Two faculty members, Williams and Chrapliwy, were never promoted.

11. A letter dated March 2, 1965, from Dr. Reeves indicates that UTEP apparently did intend to promote Plaintiff upon receipt of her Ph.D. Plaintiff was at that time expected to complete her Ph.D. in June of 1965. By the time she actually received her terminal degree, in 1967, DR. DUKE has fallen behind in the advancing, faculty upgrading process, and the promotion was not made.

12. UTEP utilizes three major criteria to determine whether to grant a promotion: teaching ability, research and publication, and service to the University (see, e.g., Plaintiff's Ex. 50). This promotion standard was adopted as a part of the general improvement program.

13. Research and publication are especially crucial in the science-related fields, as noted by the Ad Hoc Committee on Gender Related Salary Inequities in its report of early 1973 (Defendant's Ex. Q.):

> Judging from the pattern of the last few years, productivity is not required for promotion and merit raises in some departments while in others, e.g., the sciences, it is essential.

14. Until 1973, Plaintiff's only publications were those required for completion of her Ph.D. degree (Plaintiff's Ex. 3, Vita of ELEANOR L. DUKE).

15. Given the heavy emphasis placed upon publication in the academic world, and especially in the area of the sciences, the Court finds that, prior to 1973, Plaintiff's lack of publications could have formed a reasonable basis for her failure to obtain a promotion.

16. Evidence regarding teaching ability reflects that in 1974, Plaintiff was one of the three UTEP professors nominated for the Minnie Piper Teaching Excellence Award (Plaintiff's Ex. 14). No evidence was presented concerning the quality of Plaintiff's teaching for the years 1967 to 1974.

17. Service to the University is the third major criterion. Plaintiff's vita shows that she is a member of many university and national organizations, as well as being active in many community groups.

18. Other evidence, however, shows that Plaintiff experienced a great deal of difficulty with interdepartmental relations (Plaintiff's Ex.'s 8-10, 15-19). Considering these exhibits and the testimony of several witnesses, including the Plaintiff herself, the Court concludes that many, if not most, of Plaintiff's problems with her colleagues stem from personality conflicts generated in large part by the Plaintiff.

19. Evidence concerning a male biology professor, Dr. Peter chrapliwy, is also illustrative on the point of promotion. He joined the UTEP faculty in 1960, received his Ph.D. in 1962, five years before Plaintiff, but his publication record tapered off in the early 1960's. Dr. Chrapliwy was not promoted to full professor upon receipt of his Ph.D., and he remains an associate professor to this day.

20. Based on UTEP's promotional criteria, then, the Court finds that Plaintiff has failed to show that her denial of a promotion before 1976 was gender-related, and UTEP has advanced legitimate reasons for such denial, in particular Plaintiff's meager publication record.

B. Unequal Pay

21. Plaintiff has also claimed that the discrepancies between her salary and the salaries of male professors in her department are impermissibly based on sex.

22. In the late fall of 1972, the University formed an Ad Hoc Committee on Gender Related Salary Inequities. This was in response to a suggestion by H.E.W., made on September 29,

1972, that UTEP evaluate its salary structure as applied to male and female faculty members (Defendant's Ex. Q).

23. This committee was composed of seven University faculty members, four of whom were women. The committee met a total of thirteen times, and conducted a comprehensive analysis of salary differentials between male and female faculty. Evaluative criteria centered mainly on UTEP's usual factors for promotion and pay raises, i.e., teaching effectiveness, scholarly work, and contributions to the University and the community.

24. Of the sixty-nine female faculty members evaluated for gender-based salary inequities, the committee found that ten women were paid less than their maile counterparts due to impermissible gender cconsiderations.

25. With regard to DR. DUKE, the committee found no gender-related salary inequity.

26. The Court finds this report to be credible evidence, entitled to due consideration in the Court's decision.

27. As with promotions, pay raises and salaries are determined by the three above-mentioned criteria. Again, publication plays an inordinately large role, a factor which is sex-neutral.

28. The Court finds that Plaintiff's annual salary was set, throughout her years of service, in accordance with the accepted academic principles as set out above, with yearly evaluations of her teaching effectiveness, research and publication, and service to the University. Again, the fact that Plaintiff had a paucity of research and publication entered into the setting of her annual salaries and caused her pay to be lower than the active researchers and publishers in her department. That her lack of research was the actual reason for the level of her pay and not sex is evidenced by two independent circumstances. First, when Plaintiff has two publications in 1973, her salary increased on the next occasion when the University has merit money to award. And, when she had one publication in 1978, this fact was reflected in her evaluation for research and the setting of her next annual salary. Second, Dr. Peter Chrapliwy, a male biology professor, was treated in an almost identical manner.

Prior to the promotion of Plaintiff in 1976, both were associate professors. He received his Ph.D. earlier than Plaintiff and his salary was slightly higher until the mid-1960's, when he ceased researching after producing some fifteen publications prior to that time. From 1966 until Plaintiff's promotion in 1976, there was never more than $450 difference in their salaries, with Plaintiff's salary being equal to or above his salary five of those ten years. It is also significant that the teaching performance of both Plaintiff and Dr. Chrapliwy is somewhat similar - both teach large classes of students and are popular teachers. One year Plaintiff was one of three annual nominees for a teaching award (Plaintiff's Ex. 14). Dr. Chrapliwy has been nominated for and received several teaching awards during the past ten years, yet he has never been promoted to full professor. Plaintiff's salary is much higher than Dr. Chrapliwy's today.

29. The Court finds that Plaintiff has not been discriminated against in the setting of her salary.

30. The Court would further note, apropos of both the salary and promotion issues, that the academic environment is *sui generis* in many respects. Although objective statistics might indicate unexplained differences between treatment of male and female professors, many subjective criteria enter into departmental decisions, and no standard formula is available, or desirable, to decide advancement within academia. The Court is extremely reluctant to impose any objective guidelines on matters best left to those within the ivy-covered walls.

The above is, of course, merely dicta; the Court is of the opinion that Plaintiff has failed to demonstrate any discrimination against her on the basis of sex, an opinion which the Court would hold regardless of Plaintiff's profession.

C. Summer School

31. Plaintiff's third and final contention is that she was denied the same opportunities to teach summer school as males were given. This complaint refers only to summers before 1977. Plaintiff claims that on numerous occasions she desired to teach summer school but was not so assigned.

32. For at least the years 1975 and 1976, Plaintiff was offered a summer school position, but declined to accept it (Defendant's Ex.'s O, P, T & U).

33. While there were no substantiating documents for the years before 1975, the heads of the Department of Biological Sciences testified that Plaintiff was never refused summer employment and certainly not on the basis of sex.

34. The evidence indicates that Plaintiff obtained summer employment for two summers between 1972 and 1977 (Plaintiff's Ex. 16 from Evidentiary Hearing held before this Court August 11, 1980). When 1975 and 1976 are excluded (the years for which Plaintiff declined summer employment), it is seen that Plaintiff taught summer school two out of a possible four summers.

35. The Court concludes that Plaintiff was not discriminated against on the basis of sex with regard to summer employment.

D. Other acts alleged to be discriminatory

36. At trial, Plaintiff offered testimony regarding several incidents which, while not directly related to her three main claims, are apparently offered to suggest some type of sexual harrassment.

37. The first of these incidents occurred during the 1971-1972 school year. Bat guano, a product of another professor's research, was placed in bags in the hall outside the offices of DR.'s DUKE and Williams (a male). Plaintiff claims that dust from this matter ruined a substantial amount of her own research. Insofar, however, as a male professor was subjected to the same emanations from the guano, the incident cannot be characterized as aimed at Plaintiff fell off a stage in one of her classrooms, necessitating the use of crutches. She requested a classroom closer to her office to accomodate her temporary disability; this request was inexplicably delayed in reaching the Registrar's Office. A letter apologizing for this oversight was promptly written to Plaintiff by Kenneth Beasley, Vice-President of Academic Affairs (Plaintiff's Ex. 5).

This incident does not indicate sexual harrassment in any form.

39. Plaintiff also complains of the fact that when the new science building at UTEP was completed, she received a used autoclave, while her male colleagues were given new ones. There were no assertions that Plaintiff's autoclave is in any way operationally defective; the machine's age appears to be its chief fault. (Some repairs have been done on Plaintiff's autoclave, but there was testimony at trial from a fellow biology professor, Dr. Robertstead, that his brand-new autoclave had been worked on as well.) The Court finds that the mere issuance of an Army surplus autoclave to Plaintiff does not constitute sexually-based, disparate treatment of her.

CONCLUSIONS OF LAW

1. Jurisdiction with this Court is proper under both 42 U.S.C. §2000e, *et seq.*, and §1983.

2. It is now established that a state university in Texas is an arm of the State, and thus suit under §1983 is barred by the Eleventh Amendment. *United Carolina Bank v. Board of Regents of Stephen F. Austin State University*, 665 F.2d 553 (5th Cir. 1982); *Henry v. Texas Tech University, et al.*, 466 F.Supp. 141 (N.D.Tx., Lubbock Division, 1979). Plaintiff's §1983 claim against UTEP is thus not cognizable.

3. For purposes of her Title VII (§2000e) claim, Plaintiff has satisfied all administrative prerequisites.

4. The basic allocation of burdens of proof in a Title VII case alleging discriminatory treatment are clear: the plaintiff has the burden of proving by a preponderance of the evidence a *prima facie* case of discrimination; if this is done, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the apparent disparate treatment; if the defendant is able to carry this burden, the plaintiff then has an opportunity to prove by a preponderance of the evidence that the articulated reasons are merely pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973); *Texas*

Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

5. Establishing a prima facie case under Title VII is relatively easy. By her showings of a lesser salary, overall, than her male counterparts in the biology department, and the length of time between her obtaining a Ph.D. and being promoted to full professor, DR. DUKE has raised sufficient facts to establish a prima facie case.

6. The Court must now, therefore, examine the explanation proffered by UTEP to determine whether a legitimate, non-discriminatory reason exists for such disparaties. (It should be noted that a defendant need not persuade the court that it was actually motivated by the proffered reasons; the defendant's evidence must merely raise a genuine issue of fact as to whether it discriminated against the plaintiff. *Burdine*, at 254, citing *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978).)

7. The evidence amply demonstrated that legitimate, non-discriminatory reasons existed for UTEP's treatment of DR. DUKE. As well as an overall inability to get along with her colleagues, DR. DUKE exhibited an indifference to working within the framework of departmental policy. In the area of publication and research, the *sine qua non* (in its most literal sense) of the academic world, DR. DUKE's record was sparse. When coupled with the fact that male professors were treated similarly when in similar situations, the weight of the evidence shows that any "disparate" treatment of DR. DUKE by UTEP was not motivated by impermissible reasons.

8. This showing by UTEP shifts the burden back to Plaintiff to prove that such explanations are pretextual. *McDonnell Douglas, supra.* After carefully examining the evidence, the Court concludes that Plaintiff has not met this supplemental burden, which is typically satisfied by a plaintiff's either directly persuading the court that a discriminatory reason more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence. *Id.*, at 804-805; *Burdine*, at 256.

9. Plaintiff has failed to show that discrimination was foremost in UTEP's collective mind in its treatment of her (or indeed that discrimination was even an unconscious factor). Further, the Court finds that UTEP's explanation is credible.

10. For the foregoing reasons, Plaintiff is entitled to none of the relief sought.

11. Costs of court are to be assessed against the Plaintiff.

In accordance with the above Findings of Fact and Conclusions of Law, judgment will be entered for Defendant UNIVERSITY OF TEXAS AT EL PASO.

SIGNED and ENTERED this 27th day of January, 1983.

LUCIUS D. BUNTON
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS EL PASO DIVISION

ELENOR DUKE	§	
	§	
V.	§	NO. EP-79-CA-246
	§	
THE UNIVERSITY OF TEXAS AT EL PASO	§	
	§	

JUDGMENT

In accordance with this Court's Findings of Fact and Conclusions of Law heretofore entered,

IT IS ORDERED, ADJUDGED, and DECREED that Plaintiff taking nothing in this action.

Costs are assessed against Plaintiff, for which execution may issue if not timely paid.

SIGNED and ENTERED this 27th day of January, 1983.

LUCIUS D. BUNTON
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ELENOR DUKE	§	
V.	§	NO. EP-79-CA-246
THE UNIVERSITY OF	§	
TEXAS AT EL PASO	§	

ORDER

The Plaintiff has filed an employment discrimination lawsuit alleging sex discrimination in violation of Title VII, 42 U.S.C. Section 2000e, et seq., against UNIVERSITY OF TEXAS AT EL PASO. The Defendant filed a Motion to Dismiss. A hearing on the Motion to Dismiss was held on May 5, 1980. An evidentiary hearing was held on August 11, 1980, which effectively converted the Motion to Dismiss to a Motion for Summary Judgment. The Defendant's motion alleged failure to exhaust administrative remedies as required by Section 706(c) of Title VII. Specifically, the Defendant claims that Tex. Rev. Civ. Stat. Ann., Article 6552-16, is a deferral statute under Section 706(c) of Title VII that is properly applicable in this case, and that the Plaintiff did not comply with the statute. Consequently, the Defendant contends that under the United States Supreme Court decision in *Mohasco Corporation v. Silver*, #79-616, the Plaintiff's Complaint was not timely filed and this Court, therefore, lacks jurisdiction.

The Court is of the opinion that the Defendant's position has merit, and hereby grants the Defendant's Motion for Summary Judgment, as the Court lacks jurisdiction to hear the case by reason of the Plaintiff's failure to exhaust administrative remedies required by Section 706(c) of Title VII.

SO ORDERED this 5th day of September, 1980.

LUCIUS D. BUNTON
United States District Judge

APPENDIX G

Eleanor DUKE, Plaintiff-Appellant,

v.

UNIVERSITY OF TEXAS AT EL PASO,
Defendant-Appellee.

No. 80-2094.

United States Court of Appeals,
Fifth Circuit.

Dec. 9, 1981.

Rehearing and Rehearing En Banc
Denied Jan. 26, 1982.

Professor brought action against university alleging that the university discriminated against her in promotion, compensation, and assignment because of sex. The United States District Court for the Western District of Texas, Lucius Desha Bunton, III, J., granted summary judgment in favor of the university and professor appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that Texas statute prohibiting discrimination by state employees on the basis of sex in refusing to grant a benefit did not apply to the professor's claim, so that the claim was not required to be referred to state authorities before being considered by the EEOC.

Reversed and remanded.

1. Civil Rights —38

Three circumstances must exist before the referral requirement of Title VII is triggered; the acts alleged must constitute an unlawful employment practice under Title VII, they must violate a state or local law, and the state or locality must have established or authorized some agency to remedy the violation or to seek criminal penalties. Civil Rights Act of 1964, § 706(b) as amended 42 U.S.C.A. § 2000e-5(c).

2. Federal Courts — 392

Texas courts have no authority to hear certified questions from federal courts.

3. Statutes —205

Statute must be viewed in its entirety to afford each part an effect harmonious with the whole and consistent with the legislative objectives.

4. Civil Rights —32(1)

Texas statute prohibiting any officer or employee of the state from refusing to grant a benefit to anyone because of race or sex did not apply to charge of female professor that she was discriminated against in promotion, compensation, and assignment because of her sex, so that those claims were not required to be referred under the statute to district or county attorney prior to consideration by the EEOC. Civil Rights Act of 1964, § 706(b) as amended 42 U.S.C.A. § 20003-5(c); Vernon's Tex.Ann. Civ. St. art. 6252-16.

5. Statutes — 206

Statutes should be construed so that each of its provisions is given full effect; interpretations which render parts of a statute inoperative or superflous are to be avoided.

6. Statutes —241(1)

Penal statutes are to be strictly construed and ambiguities concerning the ambit of criminal statutes should be resolved in favor of lenity.

7. Constitutional Law —258(1)

Convictions obtained by virtue of unforeseen judicial construction of criminal statutes violate the due process requirement that persons be provided with fair warning of criminalized conduct.

8. Statutes —190

Where genuine ambiguity exists in a single statute and a broad interpretation of uncertain language would raise concerns regarding the adequacy of notice of forbidden conduct, threat of criminal sanctions requires that the law be closely construed.

9. Civil Rights —61

Reach of Texas statute prohibiting discrimination against people on the basis of race, religion, color, sex, or national origin in certain situations is not as great as that of Title VII. Civil Rights Act of 1964, §701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Vernon's Tex.Ann.Civ.St. art. 6252-16.

Hallmark, Villa & Keith, Antonio Cortez, El Paso, Tex., for plaintiff-appellant.

Sandra G. Bryan, Washington, D.C., amicus curiae for E.E.O.C.

Lonny F. Zwiener, Asst. Atty. Gen., Austin, Tex., for defendant-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before AINSWORTH, INGRAHAM, and TATE, Circuit Judges.

AINSWORTH, Circuit Judge:

Dr. Eleanor Duke instituted this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, alleging that her employer, the University of Texas at El Paso (UTEP), discriminated against her in promotion, compensation and assignment because of her sex. Her appeal from an adverse summary judgment concerns her compliance with Title VII's requirement that employment discrimination charges be referred to qualifying state fair employment practice agencies before federal Equal Employment Opportunity Commission (EEOC) proceedings commence.

[1] Section 706(b) of Title VII[1] "is intended to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary resort to federal relief by victims of the discrimination." *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755, 99 S.Ct. 2066, 2071, 60 L.Ed.2d 609 (1979). Three circumstances must exist before the referral requirement is triggered: (1) The acts alleged must constitute an unlawful employment practice under section 703 of Title VII; (2) they must violate a state or local law; and (3) the state or locality must have established or authorized some agency to remedy the violation or to seek criminal penalties. *White v. Dallas Independent School District*, 581 F.2d 556, 558-59 (5th Cir. 1978) (en banc); 42 U.S.C. § 2000e-5(c). Complainants themselves need not determine when these requirements are satisfied and file with state authorities. In *Love v. Pullman*, 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972), the Supreme Court approved a "referral and deferral system" by which the EEOC refers complaints to the appropriate state agency when required. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64, 100 S.Ct. 2024, 2031, 64 L.Ed.2d 723 (1980).

The unlawful employment practices alleged by Dr. Duke in this case occurred in Texas. Because the EEOC was contesting whether a Texas law, Vernon's Ann.Civ.St. Art. 6252-16,[2] trig-

---

1. Section 706(b) of Title Vii, 42 U.S.C. § 2000e-5(c), provides in pertinent part:

> In the case of an alleged unlawful employment practice occurring in a State, ... which has a ... law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such a practice ..., no charge may be filed ... by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State ... law, unless such proceedings have been earlier terminated.

2. Article 6252-16 provides in pertinent part:

> Section 1. (a) No officer or employee of the state or of a political subdivision of the state, when acting or purporting to act in his official capacity, may:
>
> (1) refuse to employ a person because of the person's race,

(footnote continued on following page)

gered the deferral requirement when Dr. Duke lodged her charge in 1973, the matter was not first referred to state authorities. This court has since ruled that where Article 6252-16 prohibits

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(footnote continued from previous page)

religion, color, sex, or national origin;

(2) discharge a person from employment because of the person's race, religion, color, sex, or national origin;

(3) refuse to issue a license, permit, or certificate to a person because of the person's race, religion, sex, or national origin;

(4) revoke or suspend the license, permit or certificate of a person because of the person's race, religion, sex, or national origin;

(5) refuse to permit a person to use facilities open to the public and owned, operated, or managed by or on behalf of the state or a political subdivision of the state, because of the person's race, religion, sex, or national origin;

(6) refuse to permit a person to participate in a program owned, operated, or managed by or on behalf of the state or a political subdivision of the state, because of the person's race, religion, sex, or national origin;

(7) refuse to grant a benefit to, or impose an unreasonable burden upon, a person because of the person's race, religion, sex, or national origin;

(8) refuse to let a bid to a person because of the person's race, religion, sex, or national origin.

(b) The provisions of (a) of this Section do not apply to a public school official who is acting under a plan reasonably designed to end discriminatory school practices.

Sec. 2. Whenever a person has engaged, or there are reasonable grounds to believe that a person is about to engage in an act or practice prohibited by Section 1 of this Act, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved. In an action commenced under this Section, the court, in its discretion, may allow the prevailing party, other than the state, a reasonable attorney's fee as part of the costs, and the state is liable for costs the same as a private person.

. . . .

Sec. 3. A person who knowingly violates a provision of this Act is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than One Thousand Dollars ($1,000) or by imprisonment in the county jail for not more than one year or by both.

Sec. 4. The District Attorneys and/or County Attorneys of this state are hereby designated as the appropriate state or local official to receive the notice of an alleged unlawful employment practice occuring in this state from the Equal Employment Opportunity Commission as provided for in Public Law 88-352, Title VII, Section 706(c); 78 Stat. 241 (42 U.S.C. 2000e-5).

the discriminatory act alleged, deferral is necessary, even though the state authorities that the Texas law empowers to act are district and county attorneys. *White v. Dallas Independent School District*, supra, 581 F.2d at 560-61; *See Nueces County Hospital District v. EEOC*, 518 F.2d 895 (5th Cir. 1975). After Dr. Duke received her right to sue letter and initiated this suit, 42 U.S.C. § 2000e-5(f)(1), UTEP moved to dismiss, asserting that her failure to refer to state authorities rendered her charge with the EEOC premature. Without the filing of a timely charge with the EEOC, UTEP argued, a subsequent action in district court was barred. After an evidentiary hearing, the court agreed and entered summary judgment against Dr. Duke.

[2] *White* dictates the course of our review of the district court's decision, requiring that we construe the Texas statute to determine whether it forbids the discriminatory acts alleged.[3] If the unlawful employment practices charged by Dr. Duke are not within the ambit of the statute, then the failure to refer to state authorities is immaterial to her present action.

The Texas Anti-Discrimination Statute

[3] Familiar principles of statutory construction guide our examination of Article 6252-16. A statute must be viewed in its entirety, to afford each part an effect harmonious with the whole and consistent with legislative objectives. *Philbrook v. Glodgett*, 421 U.S.707, 713, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975); *Payne v. Panama Canal Co.*, 607 F.2d 155, 164 (5th Cir. 1979); *United States v. Alexander*, 602 F.2d 1228, 1231 (5th Cir. 1979); *State v. Terrell*, 588 S.W.2d 784, 786 (Tex.1979); *Barr v. Bernhard*, 562 S.W.2d 844, 849 (Tex.1978); *Black v. American Bankers Insurance Co.*, 478 S.W.2d 434, 437 (Tex.1972). Section 1(a) of Article 6252-16 consists of eight subsections. Each subsection prohibit discriminatory acts in a specific realm of state func-

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3. The Texas courts have not construed the provisions of Article 6252-16 in dispute here. Certification to the Texas Supreme Court is not an option since Texas courts have no authority to hear certified questions from federal courts. See Brown, *Fifth Circuit Certification—Federalism in Action*, 7 Cum.L.Rev. 455 (1977).

tion, such as hiring and firing employees, managing public facilities, letting bids and issuing licenses. The design and precise language of the section suggest that each subsection was intended by the legislature to be equal in scope. No terminal "catch-all" provision was appended to extend the statute's reach to acts other than those enumerated. Significantly, Article 6252-16 falls far short of a general interdiction of discrimination by the state. The Texas legislature could have readily adopted a broader mandate of nondiscrimination in much briefer terms had that been its intention. Instead, it elected to pursue a more narrowly gauged aim of outlawing particular discriminatory practices in discrete areas of state operation. The statute must be construed in accord with this evident legislative objective.

[4,5] The parties acknowledge that only three subsections of Article 6252-16 are relevant to this case. Subsections (a)(1) and (2) forbid state officials from discharging or refusing to hire a person because of his race, religion, sex, or national origin. Conceding that these provisions are inapplicable to Dr. Duke's charges, UTEP urges that subsection (a)(7)'s ban on discriminatory refusals "to grant a benefit" be interpreted to encompass the unlawful employment practices alleged by Dr. Duke. Even if "benefit" were susceptible of such an interpretation standing alone, we cannot construe one subsection in isolation from the remainder of the statute. *Philbrook v. Glodgett, supra* 421 U.S. at 713, 95 S.Ct. at 1898; *United States v. Alexander, supra,* 602 F.2d at 1231; *Barr v. Bernhard, supra,* 562 S.W.2d at 849; *Black v. American Bankers Insurance Co., supra,* 478 S.W.2d at 437. If the term "benefit" were construed to include public employment, then subsection (a)(1)'s prohibition of discriminatory refusals to hire would be rendered superflous by subsection (a)(7)'s ban on discriminatory refusals to grant a benefit. It is well established that a statute should be construed so that each of its provisions is given its full effect; interpretations which render parts of a statute inoperative or superflous are to be avoided. *Weinberger v. Hynson, Westcott and Dunning, Inc.,* 412 U.S. 609, 633, 93 S.Ct. 2469, 2485, 37 L.Ed.2d 207 (1973); *In re Surface Mining Regulation Litigation,* 627 F.2d 1346, 1362 (D.C. Cir. 1980); *Motor and Equipment Manufacturers Association, Inc. v. EPA,* 627 F.2d 1095, 1106 (D.C.Cir.1979). Under UTEP's expansive reading of "benefit,"

subsection (a)(7) would assume a dominance in relation to the remaining seven subsections inconsistent with the statute's apparent purpose of banning discrimination in eight independent areas of state activity.

Furthermore, subsections (a)(1) and (2) indicate that the Texas legislature was mindful of the ills of discrimination in public employment when it enacted Article 6252-16, but chose only to ban discriminatory discharge and refusal to hire, perhaps based on the belief that these discriminatory acts were of a more egregious nature than discrimination in pay, promotions and assignment, thereby warranting criminal penalties. Whatever the reasons for the legislative decision, the absence of a specific prohibition of the discriminatory acts alleged by Dr. Duke in the two subsections expressly devoted to employment discrimination supports an inference that the legislature did not intend to outlaw other acts of employment discrimination by submerging an implied ban elsewhere in the statute. Drawing an inference of an intent to exclude a particular result from the failure to expressly proscribe that result is the essence of the common law maxim "expressio unius est exclusio alterius," often applied as an aid in statutory construction. The maxim embodies a sensible insight into the customary manner in whch language is used to communicate ideas. Simply stated, "[i]t expresses the learning of common experience that generally when people say one thing they do not mean something else." 2A C. Sands, *Statutes and Statutory Construction* §47.24 (4th Ed. 1973); see *Andrus v. Glover Construction Col,* 446 U.S. 608, 616-17, 100 S.Ct. 1905, 1910, 64 L.Ed.2d 548 (1980); *Rogers v. Frito-Lay, Inc.,* 611 F.2d 1074, 1085 (5th Cir. 1980); *Marshall v. Gibson's Products, Inc. of Plano,* 584 F.2d 668, 675, (5th Cir. 1978); *Bott v. American Hydrocarbon Corp.,* 458 F.2d 229, 233 (5th Cir. 1972); *Smith v. Baldwin,* 611 S.W.2d 611, 616 (Tex.1980). No indication is apparent here of a legislative intent that we should construe the statute otherwise.

[6,7] Reinforcing the view that Dr. Duke's allegations fall outside Article 6252-16 is the statute's penal character. Section 3 of the act establishes a criminal penalty for violations. By a long standing rule of statutory construction buttressed by

constitutional underpinnings,[4] penal statutes are to be strictly construed. Ambiguities concerning the ambit of criminal statutes should be resolved in favor of lenity. *Busic v. United States*, 446 U.S. 398, 406, 100 S.Ct. 1747, 1753, 64 L.Ed.2d 381 (1980); *Dunn v. United States 442 U.S. 100, 112, 99 S.Ct. 2190,2197,60 L.Ed.2d 743 (1979); Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 375, 93 S.Ct. 1652, 1663, 36 L.Ed.2d 318 (1973); *United States v. Campos-Serrano*, 404 U.S. 293, 297, 92 S.Ct. 471, 474, 30 L.Ed.2d 457 (1971); *McBoyle v. United States*, 283 U.S. 25, 27, 51 S.Ct. 340, 341, 75 L.Ed. 816 (1931); *United States v. Scrimgeour*, 636 F.2d 1019, 1022 (5th Cir. 1981); *Tenneco Oil Co. v. Padre Drilling Co.*, 453 S.W.2d 814 (Tex.1970). 3 C. Sands, *Statutes and Statutory Construction* § *59.03* (4th ed. 1973). An interpretation of the word "benefit" broad enough to incorporate Dr. Duke's charges within the statute would clash with the policy of assuring fair warning of punishable conduct that underlies the rule of strict construction. *Dunn v. United States, supra*, 442 U.S. at 112, 99 S.Ct. at 2197; *Mourning v. Family Publications Service, Inc., supra*, 411 U.S. at 375, 93 S.Ct. at 1663.

[8] UTEP urges that since section 2 of the act also authorizes aggrieved persons to seek injunctive relief, we should scrutinze section 1(a) by less demanding standards than we would a criminal statute. This argument might be persuasive if the criminal statute were but a small part of a broad regulatory scheme and free from ambiguity, as in *Mourning*. In that case the Supreme Court ruled that in such circumstances, strict construction was inappropriate. Where, as here, a genuine ambiguity exists in a single statute and a broad interpretation of the uncertain language would raise concerns regarding the adequacy of notice of forbidden conduct, the threat of criminal sanctions

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4. Convictions obtained by virtue of unforseen judicial construction of criminal statutes violate the due process requirement that persons be provided with fair warning of criminalized conduct. *Dunn v. United States*, 442 U.S. 100, 112, 99 S.Ct. 2190, 2197, 60 L.Ed.2d 743 (1979); *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977); *Rabe v. Washington*, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972); *Bouie v. City of Columbia*, 387 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

requires that the law be closely construed. We note further that without the criminal penalty provided by section 3, the remaining provisions of Article 6252-16 would be insufficient to trigger Title VII's referral requirement.

[9] UTEP contends that if the Texas statute is held not to forbid the discriminatory acts alleged by Dr. Duke then by implication Title VII likewise would fail to proscribe these forms of discrimination. Such reasoning overlooks the substantial differences between the two statutes. Not only does section 703(a)(1) of Title VII, like Article 6252-16, outlaw discriminatory discharges and refusals to hire, but it also proscribes discrimination "with respect to ... compensation, terms, conditions, or privileges of employment ...." 42 U.S.C. § 2000e-2(a)(1). By its plain terms, Title VII's reach is far greater than the Texas statute's. *Nueces County Hospital District v. EEOC, supra,* 518 F.2d at 897 n.2.

From the analysis above, it seems reasonably clear that Dr. Duke's assertions of discriminatory pay, promotion and assignment practices lie beyond the reach of Article 6252-16. We conclude, therefore, that the district court erred in entering summary judgment against her and remand the case to permit her to proceed with her claim for relief.

REVERSED and REMANDED.

Office-Supreme Court, U.S.
FILED
OCT 18 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-411

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SUPREME COURT OF THE UNITED STATES
_____ TERM, 198__

* * * * * * * * *

THE UNIVERSITY OF TEXAS AT EL PASO,
Petitioner

v.

ELEANOR DUKE,
Respondent

* * * * * * * * *

On Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit
Brief for Respondent

* * * * * * * * *

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QUESTIONS PRESENTED

1. Whether a female faculty member alleging sex discrimination with regard to promotions, pay disparity, and job assignments who seeks to represent a class of other female faculty members with identical claims is entitled to conduct any discovery on employment practices in the academic departments which employ class members.

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STATEMENT OF THE CASE

Respondent accepts the Statement of the Case submitted by Petitioner, with three exceptions. First, the Petitioner's Statement, on Page 3 of its Brief, that the EEOC issued a Right to Sue Letter to Doctor Duke should also indicate that the EEOC additionally issued its Determination, which included, in part, a reasonable cause finding that class wide sex discrimination had occurred as alleged in Dr. Duke's charge.

Second, the Respondent strongly takes issue with the Petitioner's contention on Page 4 of its Brief that the Class

Certification Hearing held on May 19, 1982, confirmed the fact that decisions with respect to pay, promotion, tenure and other conditions of employment were made within various departments. The record is strongly to the contrary. Dr. Olander, the Vice President for Academic Affairs, testified that every faculty promotion or salary adjustment proposal crossed his desk and was reviewed by him. He further testified that he applied uniform standards to review all such proposals regardless of the department affected.

Third, Petitioner omits crucial dates. Although the parties briefed their discovery dispute and were prepared to

argue it on May 19, 1982, the District Court declined to hear it at that time. It denied Plaintiff's discovery requests at approximately 4:30 PM on October 18th, and forced Plaintiff to trial at 9:00 AM, October 19th. This eleventh hour discovery denial was the error addressed by the Fifth Circuit.

SUMMARY OF THE ARGUMENT

The Petitioner's detailed dissertation on the current status of the law as to class actions in Title VII cases, is misplaced, and at best premature. The Court of Appeals decided that Respondent was entitled to the discovery which she requested prior to the hearing on class certification and prior to the trial on her individual claim, and that is all that it decided. The question of class certification has not yet been reached in light of the Court's ruling, since Respondent must first have the benefit of the discovery which she had been previously denied. Petitioner's attempt to

characterize the issues raised by the Court of Appeals' decision as involving continued adherence by the Fifth Circuit to the "across-the-board" class action approach is inaccurate and superfluous.

REASONS FOR NOT GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT DEALS PURELY WITH DISCOVERY ISSUES AND IS IN NO WAY INCONSISTENT WITH THIS COURT'S DECISIONS IN EAST TEXAS MOTOR FREIGHT SYSTEM V. RODRIGUEZ, 431 U.S. 935 (1977) AND GENERAL TELEPHONE COMPANY V. FALCON, 457 U.S. 147 (1982).

This is a case about a Plaintiff's right to discovery. The Petitioner's attempt to categorize it as a resurrection of the "across-the-board" class action rule of the Fifth Circuit is completely without support. Unlike East Texas Motor Freight, supra, the Court of Appeals in this case did not certify this litigation as a class action, did not determine that there was

class wide liability, nor did it even make a ruling on the merits of Dr. Duke's individual claim. It simply held that Dr. Duke was entitled to conduct meaningful discovery.

Respondent believes that the law clearly allows for the conducting of discovery on class certification issues, Trevino vs. Celanese Corp., 701 F.2d 397, 406 (5th Cir. 1983); and Burns vs. Thiokol Chemical Corp., 483 F.2d at 300, at 304-05 (5th Cir. 1973), and the Petitioner has not challenged this principle. The denial of any class wide discovery was the error which required the Fifth Circuit's remand to the District Court. Duke v. UTEP, 729 F.2d 994 at 997 (5th Cir. 1984).

The Petitioner argues that the Record on Appeal "forcibly demolishes any possibility that there can be a class of University female faculty members who are victims of discrimination." (Page 7 Petitioner's Brief) The Petitioner chooses to not include in its version of the Record the EEOC Finding of reasonable cause to believe that the university discriminated on a class wide basis against females in the area of compensation, and which cited the following data, obtained from university budgets, in support.

I. Professors

Males		Females	
No.	Average Salary	No.	Average Salary
100	$17,047	3	$15,700

II. Associate Professors

Males		Females	
No.	Average Salary	No.	Average Salary
83	$14,041	4	$13,175

III. Assistant Professors

Males		Females	
No.	Average Salary	No.	Average Salary
111	$11,848	32	$10,613

IV. Instructors

Males		Females	
No.	Average Salary	No.	Average Salary
24	$9,118	26	$8,827

V. Lecturers

Males		Females	
No.	Average Salary	No.	Average Salary
1	$10,000	4	$9,275

The Petitioner also chose to omit the February 17, 1975, correspondence from the President of the University, which announced salary increases to female faculty members and stated in relevant part:

> "This increase is the result of the third comprehensive review of all University salaries. Two similar adjustments in base pay were made in April, 1973 and September, 1974. With the adjustments resulting from this final review, we believe that UT El Paso's salary levels have reached parity between the base pay of men and women. Next year we hope to be building merit pay increases on this salary structure within the limitations of appropriations."

Therefore, the Record on Appeal of the class certification hearing (which includes only that evidence which could be compiled without the beneift of <u>any</u> discovery) shows blatant class wide sex discrimination. The University budgetary figures led the EEOC to that conclusion. The University's own committee found eleven instances of gender

related pay disparity, and the University President stated that three overhauls of the salary structure were necessary to achieve parity between men and women. In light of this showing, the decision of the Court of Appeals that it was error to deny Dr. Duke the opportunity to conduct discovery on class action issues need not be reviewed by this Honorable Court.

II.

IT CERTAINLY CANNOT BE SAID AS A MATTER OF LAW, PRIOR TO CONDUCTING DISCOVERY OR DEVELOPING A FULL RECORD, THAT THIS CASE CANNOT PROCEED AS A CLASS ACTION.

Respondent must quickly point out that the class sought to be represented by Dr.

Duke is dramatically narrower than the classes in General Telephone Company of the Southwest v. Falcon,[1] supra, and East Texas Motor Freight Systems v. Rodriguez,[2] supra.

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[1] "The class of all hourly Mexican-American employees who have been employed, are employed, or may in the future be employed and all those Mexican-Americans who have applied or would have applied for employment had the Defendant not practiced racial discrimination in its employment practices." Falcon, supra, 102 S.Ct. 2364, at 2368.

[2] "All East Texas Motor Freight's Mexican-American and Black in-city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas. Additionally that such class should properly be composed of all Mexican-American and Black applicants for line driver positions with East Texas Motor Freight from July 2, 1965, (the effective date of Title VII) to present." Rodriguez, supra, at 400.

In the present case, Plaintiff Duke sought to represent only female faculty members. She did not seek to represent nurses, secretaries, administrators, or any other female employees.

The entire class was located on one campus in El Paso, Texas. Dr. Duke did not seek to represent unsuccessful applicants for hire. Rather, the class would have been composed of female faculty members discriminated against while employed. Hence, there would be no litigation of any termination of employment issues.

Dr. Duke's particular grievances essentially fall into three clearly definable categories: (1) promotions; (2)

unequal pay; and (3) unequal work assignments. No member of the class had any claim or grievance other than the type suffered by Plaintiff. There was not a single claim of failure to hire, unlawful termination, or sexual harassment. Plaintiff's claims were not merely typical of the class claims. They were identical.

III.

THE COURT OF APPEALS' STATEMENTS CONCERNING THE PLAINTIFF'S BURDEN OF PROOF IS PERFECTLY CONSISTENT WITH TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE, 450 U.S. 248 (1981) AND COOPER V. FEDERAL RESERVE BANK OF RICHMOND, ____U.S. ____, 104 S.CT. 2794 (1984).

The Petitioner challenges the following observation of the Court of Appeals which

it claims to be inconsistent with Texas Department of Committee Affairs v. Burdine, 450 U.S. 248 (1981).

> Had Duke's class claims prevailed, she would have faced a distinctly less onerous burden at the trial of her individual case. 729 F.2d, at 997.

This Honorable Court addressed the significance of class wide findings on individual claims in Cooper v. Federal Reserve Bank of Richmond, ____ U.S. ____, 104 S. Ct., 2794 (1984). In the Cooper case, there was a finding of no class wide discrimination which, under those facts, did not preclude the subsequent litigation of some individual claims. Concerning the future litigation of such individual claims, this Court pointed out that the Defendant Bank could utilize the prior class wide finding to its benefit, and stated:

> "the determination in the Cooper action that the Bank had not engaged in a general pattern or practice of discrimination would be relevant on the issue of pretext. Cooper, supra, at 2802."

Certainly the evidentiary value of a determination concerning a class wide practice of discrimination is not determined by the party in whose favor the determination was made. If a Defendant can utilize a finding of no class wide discrimination to bolster its arguments against pretext, a Plaintiff ought to be able to utilize a favorable finding of a practice of class wide discrimination to show pretext.

Hence, what was said by the Fifth Circuit in the instant case---that

prevailing on class claims can make an individual's trial burden less onerous---is perfectly consistent with this Court's holding that a Defendant can increase the onerousness of a Plaintiff's burden by showing the absence of a class wide practice of discrimination.

Certainly, the existence or non-existence of class wide discrimination is, if not determinative, then certainly relevant, on the issue of pretext. It is a circumstance which affects the credibilty of a Defendant's articulated reasons for a challenged employment decision. The credibilty of such a decision is frequently

the ultimate decision in a case. Cooper, supra, at 2799, United States Postal Service Board of Governor v. Aikins, 460 U.S. _____ at _____, 103 S.Ct. at 1482 (1983). Therefore, the Fifth Circuit was correct when it noted that the onerousness of Dr. Duke's burden would be lessened if she were armed with evidence of class wide discrimination because it is relevant to pretext.

IV.

PETITIONER'S FINAL ARGUMENT AS A REASON FOR REQUESTING THE WRIT RAISES ISSUES IN THIS COURT WHICH HAVE NOT BEEN ADDRESSED BY THE COURT OF APPEALS OR THE DISTRICT COURT, AND WHICH THEREFORE ARE INAPPROPRIATE AS GROUNDS FOR CERTIORARI.

The Petitioner's Argument, commencing on Page 14 of the Petition, challenges the

Court of Appeals' class certification practices, particularly with regard to what it alleges to be improper notice requirements. To date, no Court has determined that a class action is appropriate, and therefore no Court has addressed the question of the type of notice, if any, to be issued to potential class members. It is clearly inappropriate to raise in the first instance in this Court an issue which has not yet been presented, let alone addressed, in any lower court.

Furthermore, the Defendant challenges what it alleges to be "the law of the Fifth

Circuit" as evidenced by Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) and Person v. Terminal Transport Company, 634 F.2d 989 (5th Cir. 1981).[3] What the Defendant is apparently challenging is the law of the Fifth Circuit prior to the Supreme Court's Ruling in General Telephone Company v. Falcon, supra. In doing so, Petitioner ignores the fact that this Court of Appeals has had those prior decisions already spoken to by this Honorable Court in Falcon.

Respondent suggests that if this Court is to consider the practice of the Fifth

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[3] Pages 15 and 16 of the Petition for Writ of Certiorari.

Circuit in cases other than the case presently pending, that it look at Fifth Circuit cases decided after the Falcon decision. One such case is Fleming v. Travenol Laboratories, Inc., 707 F.2d 829 (5th Cir. 1983) wherein the Court of Appeals addressed the very issue raised by Petitioner--the continued viability of the "across-the-board" class action rule--and squarely pronounced that rule to be dead. The Fifth Circuit stated:

> "Fleming's apparent reliance below on the Fifth Circuit's 'across-the-board' approach to Title VII class action suits is no longer legally sound. Although this Circuit formerly permitted victims of employment discrimination to maintain an 'across-the-board' attack on all unequal employment practices alleged to have been

> committed by the employer pursuant to a policy of discrimination, that practice was limited by the United States Supreme Court in General Telephone Company of the Southwest v. Falcon. In reversing the Fifth Circuit's allowance of an across-the-board class action attack, the Court stated explicitly that a 'Title VII class action, like any other class action, may only be certified if the Trial Court is satisifed, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisified.'" Fleming, supra, at 832-33.

Quite simply, the Petitioner is requesting this Honorable Court to correct a problem which has already been corrected. In the Falcon case, this Court effectively ended the Fifth Circuit's prior reliance on the "across-the-board" approach to class action issues in Title VII cases. Petitioner does not cite a single case

decided by the Fifth Circuit subsequent to Falcon wherein they have utilized the "across-the-board" theory. In the above cited provision from the Fleming case, there can be no doubt but that the Fifth Circuit has heeded the directive of this Court expressed in Falcon and pronounced the death of the "across-the-board" rule. Certiorari need not be granted if the only reason for doing so is to allow this Court to repeat a prior holding which is unmistakably being followed.

CONCLUSION

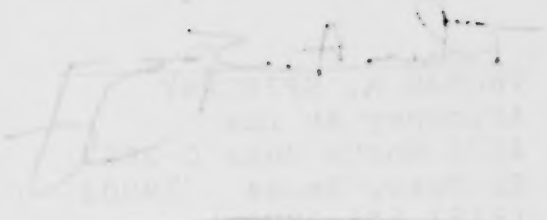
For the above stated reasons, Respondent believes that the Petition for Writ of

Certiorari should be denied with all costs being charged to the Petitioner in accordance with Rule 50.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By affixing their signatures to the above and foregoing Brief for Respondent to the United States Court of Appeals for the Fifth Circuit, Thomas A. Spieczny and Antonio Cortez hereby certify that three true and correct copies of same have been served on this the 12th day of October, 1984, by United States Mail, postage prepaid, upon:

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